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IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

OCTOBER TERM, 1965.

JAMES E. MILLS,
Defendant, Appellant,

v.

STATE OF ALABAMA,
Plaintiff, Appellee.

On Appeal from the Supreme Court of Alabama.

BRIEF

Of Alabama Press Association and Southern Newspaper Publishers Association, as Amici Curiae, in Support of Appellant's Jurisdictional Statement.

This case presents the fundamental question whether the State of Alabama may constitutionally prohibit the press of that state from exercising a free editorial voice at the time elections are held. We submit that any such action is prohibited by the provisions of the First Amendment to the Constitution which specifically forbid any abridgement of freedom of speech or of the press.

Alabama Press Association, representing Alabama's daily and weekly newspapers, has a vital and immediate concern in the preservation of these fundamental freedoms. For this reason the Association submits this brief, pursuant to Rule 42 of the Rules of this Court, in support of Appellant's Jurisdictional Statement. The consent of the parties has been given in writing and has been submitted to the Court. The Association appeared at the trial court and in the Alabama Supreme Court in support of the position of the defendant. Southern Newspaper Publishers Association joins in this brief in support of the position taken by Alabama Press Association.

ARGUMENT.

I.

The Action of the Alabama Supreme Court in Overruling Appellant's Demurrers to the Indictment Was, in Effect, a Final Judgment.

Ordinarily, the overruling of demurrers by the highest appellate court of a state does not present a final judgment or decree, as required for appeal to this Court under 28 U. S. C., § 1257 (2). **Pope v. Atlantic Coast Line R. Co.**, 345 U. S. 379 (1952). But as Chief Justice Vinson there noted, the Court is "not bound to determine the presence or absence of finality from a mere examination of the 'face of the judgment.' We have not interpreted § 1257 so as to preclude review of federal questions which are in fact ripe for adjudication when tested against the policy of § 1257."

In the **Pope** case the petitioner conceded that while he had the right, under local law, to return to the trial court and raise other defenses, he had none to raise. This Court there took jurisdiction.

In the recent case of **Local No. 438 v. Curry**, 371 U. S. 542 (1963), Justice White cited the **Pope** case as authority for review under § 1257 of a decision by the Georgia Supreme Court to the effect that Georgia courts have jurisdiction to enjoin picketing by a union. Again, this Court looked to the whole record and saw that nothing but unnecessary delay, with continuing prejudice to the important interests of the appellant and others similarly situated, would result from awaiting the totally predictable result of remand to the trial court.

This Court has increasingly recognized that to defer review until the state court machinery has run its full

and wholly predictable course may in some cases only serve to frustrate the interest of the petitioner or appellant as effectively as if review were to be denied. When the Court, in **Local No. 438 v. Curry** refused to follow **Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.**, 344 U. S. 178 (1952), it recognized that the issue was one of a state asserting the power to regulate activity which it might not constitutionally regulate, and not merely whether it dealt improperly with a particular party. The Court also there recognized that a temporary injunction may permanently frustrate the legitimate aims of the enjoined party.

A similar situation is presented in this case, with yet an additional factor: The arrest of appellant in November, 1962, served in effect to enjoin every newspaper in Alabama from commenting on current issues at election time.

Since November of 1962 many local, state, and national elections have been held in Alabama. The newspapers have had to take care not to make any editorial comment on any matter before the electorate in any publication which might be on the newstands on election day. This is an unconscionable, continuing burden not only upon the press but also upon the electorate, which must have at all times the right to purchase a newspaper and read news and fair comment on the news.

If review by this Court should be deferred for another two to three years, pending the formality of a trial with no issue and an appeal with certain outcome, no end will be served but to silence the entire press of Alabama on the vital issues before the electorate, at the very times when free discussion is most needed—the time when the people exercise their right to vote.

II.

The Alabama Attempt to Prohibit the Right of Free Press at Election Time Presents a Substantial Federal Question.

The statute in question violates both the Fourteenth Amendment due process prohibition against vagueness and the First Amendment protection of the freedom of the press.

The applicable portion of the statute, Code of Alabama, 1940, T. 17, § 285, states:

> It is a corrupt practice for any person on any election day to . . . do any electioneering or to solicit any votes. . . .

"Electioneering" and "solicit" are not defined. Apparently, a billboard which says "Vote for Jones" must come down at midnight before election day, even if located miles from a polling place. Apparently, a husband may not urge his wife to vote for his candidate. Apparently, the prohibition runs statewide even on the day of a purely local election. Apparently, the statutory prohibition continues until midnight although the polls may close at sundown.

The Alabama Supreme Court, in its opinion (R. 33) takes the position that, even with respect to legislation which restricts the First Amendment freedoms, such as is here involved, "all presumptions and intendments should be indulged in favor of the validity of a statute, and its unconstitutionality should appear beyond a reasonable doubt before it will be held invalid." The Court also stated (R. 35) that:

> "A law cannot be held to be invalid because unreasonable, unless and until it appears beyond reasonable controversy that it unnecessarily impairs to the

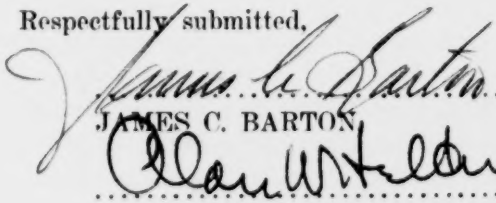
> point of practical destruction a right safeguarded by the Constitution. As has already been pointed out, the law under consideration lies within the police power field and impairs only the right of free speech, which includes the right to write and publish one's views."

We can find no clearer way of demonstrating the substantiality of the question here presented than to repeat the words just above quoted—the statute in question "impairs only the right of free speech. . . ."

CONCLUSION.

For each of the reasons heretofore assigned, Alabama Press Association and Southern Newspaper Publishers Association submit that the Supreme Court of the United States has jurisdiction of this case and that substantial questions are presented.

Respectfully submitted,



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Proof of Service.

I, James C. Barton, attorney for Alabama Press Association and Southern Newspaper Publishers Association, amici curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of October, 1965, I served copies of the foregoing Brief in Support of Jurisdictional Statement upon Kenneth Perrine, Attorney for James E. Mills; upon the State of Alabama, by serving a copy of the same on Earl C. Morgan, Solicitor of the Tenth Judicial Circuit of Alabama, Jefferson County Courthouse, Birmingham, Alabama, Attorney for the State of Alabama, and upon the Hon. Richmond Flowers, Attorney General of the State of Alabama, Montgomery, Alabama; by mailing a copy in a duly addressed envelope, first class, postage prepaid, to said parties.

James C. Barton.